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October 24, 2021

Via ECF

Honorable Edgardo Ramos
United States District Judge
United States Courthouse
40 Foley Square
New York, NY 10007

Re: *United States* v. *Neil Cole,*
19 Cr. 869 (ER)

Dear Judge Ramos:

We write respectfully on behalf of Mr. Cole to request that the Court quash an improper and blatantly overbroad "if, as, and when" subpoena served earlier today by the government upon Mr. Cole on the eve of his anticipated testimony at trial. The subpoena is attached as Exhibit A.

The subpoena on its face is an obviously improper fishing expedition that does not even come close to satisfying the requirements for issuing a Rule 17 subpoena. The subpoena sets forth 21 separate categories of requests, mostly for "all documents" in each category, and many of which have no subject matter or time period limitation. Moreover, to the extent that the subpoena may cover relevant materials, those materials already are in the government's possession as a result of voluminous productions that Mr. Cole, Iconix and other third parties made to the SEC (and that we understand were provided to the U.S. Attorney's Office) or directly to the government.

The Court should quash the subpoena because (1) it fails to meet the relevancy, admissibility, and specificity requirements of *United States* v. *Nixon*, 418 U.S.

683 (1974); (2) it calls for documents that are otherwise procurable; and (3) complying with the subpoena would be "unreasonable or oppressive," Fed. R. Crim. P. 17(c)(2).

First, the subpoena fails to satisfy each of the *Nixon* requirements of relevancy, admissibility and specificity. *See* Order Granting Gov't Mot. to Quash Rule 17 Subpoena to Baked By Melissa ("BBM Subpoena Order") at 5, ECF No. 68 (quoting *United States* v. *Blakstad*, No. 19 Cr. 486 (ER), 2020 WL 5992347, at *11 (S.D.N.Y. Oct. 9, 2020) (in turn quoting *Nixon*, 418 U.S. at 700). The subpoena is precisely the type of "general 'fishing expedition'" that *Nixon* prohibits. *Id.* (quoting *Nixon*, 418 U.S. at 699–700). It includes 21 broad categories, 20 of which call for "all documents" within that category. Request 1, for example, calls for "[a]ll documents reflecting [Mr. Cole's] communications with" a list of eight individuals (only one of whom has testified in this case), regardless of subject matter or time period, and thus calls for communications that obviously are irrelevant. Another request seeks "[a]ll documents relating to any witness at the trial of *United States v. Cole*, 19 Cr. 869 (ER)," again without any subject matter or time period restriction. Many of the subpoena's other requests are similarly overbroad and plainly improper under *Nixon*.

Indeed, other courts in this District have rejected subpoena requests to defendants that are identical or substantially similar to ones in the government's subpoena to Mr. Cole. In *United States* v. *Block*, for example, Judge Oetken struck the request for "[a]ny and all documents relating to any witness at the trial," which is the same as Request 21 of the government's subpoena. *See* Order at 2, *United States* v. *Block*, No. 16 Cr. 595 (JPO) (S.D.N.Y. June 20, 2017), ECF No. 100 (subpoena reproduced at ECF No. 82-1). Judge Oetken explained that this and other requests similar to those in the subpoena here "d[id] not comport with the 'limited purpose' of a subpoena issued pursuant to Rule 17 as described in *Nixon*." *Id.* (quoting *United States* v. *Rajaratnam*, No. 09 Cr. 1184 (RJH), 2011 WL 335170, at *3 (S.D.N.Y. Feb. 2, 2011)); *see also United States* v. *Nguyen*, 507 F. App'x 64, 66 (2d Cir. 2013) (noting that Judge Rakoff had narrowed a fifteen-item "if, as, and when" subpoena to a single request for "any and all appointment books, calendars, and diaries from 2006 through 2010") (original subpoena described in Appellee's Br., 2012 WL 2884077 at *14–15).

Second, even if the subpoena satisfied these requirements, which it does not, it still should be quashed because the government cannot establish that "the[] documents 'are not otherwise procurable.'" BBM Subpoena Order at 10 (quoting *Blakstad*, 2020 WL 5992347, at *12). To the extent the subpoena encompasses relevant documents, they are otherwise procurable *from the government's own files*. Iconix and other companies and individuals have produced hundreds of thousands of documents to the government in connection with the government's investigation. Iconix alone has produced over 490,000 pages of materials, including over 300,000 pages of communications to or from Mr. Cole. In addition, we understand that the government obtained the SEC's complete investigative file, which would include, among other things, approximately 35,000 pages of documents Mr. Cole produced in response to an SEC subpoena dated

March 4, 2016 that overlaps with the government's subpoena. The SEC subpoena, for example, called for "[a]ll documents relating to Global Brands Group," as well as documents relating to Mr. Cole's resignation from Iconix, and Mr. Cole's production included calendars, Iconix emails in his possession, responsive emails from his personal email account, and responsive text messages.[1]

Further, in addition to the documents Mr. Cole produced to the SEC, Iconix certainly has produced to the government all documents associated with Mr. Cole that relate to LF/GBG. Therefore, at a minimum, the government already has all or nearly all of the documents it seeks under Requests 2, 5, and 10–20, if not also the remaining requests, from the timeframe relevant to this case.

Third, the last-minute timing of the subpoena makes compliance plainly "unreasonable or oppressive" and is reason alone to quash it. Fed. R. Crim. P. 17(c)(2). The government served this subpoena on Mr. Cole *the day before* his planned testimony. In previous cases in this District, the government has served "if, as, and when" subpoenas on defendants sufficiently in advance of their testimony and generally before the start of trial. *See, e.g.*, Def.'s Mot. to Quash, Ex. A at 2, *Block*, No. 16 Cr. 595 (JPO) (S.D.N.Y. June 11, 2017), ECF No. 82-1 (subpoena dated four days before the start of trial); Gov't's Mem. in Opp'n to Mot. for J. of Acquittal and New Trial, Ex. A at 3, *United States* v. *Fleishman*, No. 11 Cr. 32 (JSR) (S.D.N.Y. Nov. 9, 2011), ECF No. 48-1 (subpoena dated sixteen days before the start of trial).

The subpoena's last-minute timing, along with the breadth of its request, appears to be an attempt to distract Mr. Cole and his counsel from trial preparation. Mr. Cole should not be forced to spend this time frantically searching for documents the government is not entitled to or that he already has produced. The government may not use a Rule 17 subpoena to interfere with Mr. Cole's fundamental right to testify in his own defense. *See, e.g., Rock* v. *Arkansas*, 483 U.S. 44, 52 (1987 ("[A]n accused's right to present his own version of events in his own words" is "[e]ven more fundamental to a personal defense than the right of self-representation . . . .").

For these reasons, the subpoena to Mr. Cole should be quashed.

Respectfully submitted,

/s/ Lorin L. Reisner
Lorin L. Reisner
Richard C. Tarlowe

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[1] Although we understand that the government previously received from the SEC all documents produced to the SEC by Mr. Cole, we will make those documents available to the government.